

# Kluwer Competition Law Blog

## New and Significantly Expanded EU Guidance on Market Definition – The European Commission Launches a Consultation on its Draft Revised Market Definition Notice

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On 8 November 2022, the European Commission launched a public consultation on its draft revised Market Definition Notice. The new Notice provides detailed explanatory guidance based on the recent case law of the European Commission and the European Court of Justice. It takes into account the latest market developments, in particular, competition on non-price elements (such as innovation and quality), the development of digital and innovation-intensive markets and increasing globalisation.

### Market Definition Notice and its review

On 8 November 2022, the Commission released its draft revised Market Definition Notice (“**Draft Notice**”) and invited all interested parties to submit their comments. Information on how to submit a contribution is available [here](#). The Commission is consulting to update its 1997 Market Definition Notice (“**Notice**”). The Notice sets out the basic principles of defining a market, the evidence used to define markets, the process of gathering evidence and the considerations in calculating market shares. It has enhanced transparency in the Commission’s practices and decision-making and has provided guidance for enterprises. However, the Commission considers that the Notice should be updated because the appearance of multi-sided platforms, the essential role of significant investment in R&D for some enterprises and the overall increasingly global nature of business transactions raise challenges to the existing legal framework. Given the pivotal role of market definition in merger and antitrust cases, the Commission launched an evaluation of the Notice in April 2020 and released a Staff Working Document setting out the results of the evaluation in July 2021. In January 2022, it published a call for evidence to start the first review of the Notice.

The Draft Notice raises various topics. In particular, it emphasises that the outcome of market definition may differ, even when the products and geography concerned are the same, depending on the parameters of competition, the enterprises involved and the time period considered. Regarding the last aspect, the Commission refers to *Metso/Svedala*, in which the geographic market for crushers was defined as EEA-wide (para 114). In the subsequent *Outotec/Metso (Minerals Business)*, the Commission concluded that the relevant geographic market for the supply of mining capital equipment was global in scope (paras 258-261).

The Draft Notice also provides that expected structural market transitions may be taken into account when the case calls for a forward-looking assessment. The structural market transitions can affect the product market definition—for example, when there is sufficient probability that new types of products are about to emerge on the market—or the geographic market definition; for example, when there are impending technological changes or imminent changes in the regulatory framework.

### **Product market definition**

The Draft Notice retains that enterprises are subject to three main sources of competitive constraints: demand substitution; supply substitution; and potential competition. Regarding the last aspect, the Commission disagrees with some stakeholders' suggestions to give more weight to the notion in the Draft Notice or to consider it at the market definition stage.

### **Demand substitution**

The Draft Notice addresses the calls for more guidance on non-price competition. Traditionally, enterprises compete on prices and the assessment under the Notice is heavily reliant on this element. However, today, zero monetary prices form an integral part of multi-sided platforms' business strategy. It is recognised that the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product. When defining the relevant market, in addition to price increases, the Commission states that it can consider changes in other competitive parameters, such as level of innovation and quality in various aspects, such as durability, sustainability, the value and variety of uses offered by the product and availability. In the event of non-price competition, the Commission acknowledges the difficulty of applying the price-based SSNIP test; therefore, it is not rigid in the need to apply the test, but rather states it has no obligation to apply it empirically and that other types of evidence are equally valid to inform the market definition.

As regards the evidence relevant to demand substitution, the Notice focuses on the evidence of substitution in the recent past. In the Draft Notice, however, the Commission takes into account the stakeholders' opinions that such evidence is less relevant in dynamic markets and that forward-looking assessments shall be considered. More precisely, the Commission may rely on information about how customers are likely to react to hypothetical changes in relative supply conditions. It is nevertheless noted that evidence on hypothetical substitution can be less reliable than that on actual substitution and a case-by-case assessment would be applied.

In addition, the Draft Notice proposes updates related to digitalisation in recognising that barriers and costs may result from direct and indirect network effects, the costs of data portability or the degree of interoperability with other products.

### **Supply substitution**

The Draft Notice offers more guidance on situations where supply substitution can be relevant.

More concretely, this is relevant “*when defining the relevant market where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products*”. In such cases, supply substitution can be used to broaden a market definition. However, the necessary condition is that “*most, if not all, suppliers are able to switch production between products in the range of related products, while incurring only insignificant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can market them effectively in the short term*”.

### **Geographic market definition**

The Notice only lists national, EU-wide or EEA-wide dimensions of relevant markets and does not acknowledge at all that markets may be global in scope. Many stakeholders consider this to be incomplete and failing to take account of elements which may suggest markets wider than the EEA, such as (i) the existence of digital markets and (ii) the entry of international players along with increasing trends for regional and worldwide sourcing. In particular, some argue that strengthening the competitiveness of European enterprises that compete with third countries requires adaptations of the Notice. However, others warn against undue changes in the established economic methodology of defining the relevant geographic market, emphasising that the assessment should be fact-based and should not rely on uncertain predictions of the future.

The Draft Notice recognises that “*geographic markets can range from a local dimension to a global dimension depending on the conditions of competition that customers face*”. It is provided that “*when customers around the world have access to the same suppliers on similar terms regardless of the customers’ location, the relevant geographic market is likely to be global*”. The Commission’s decisional practice in merger and antitrust cases alike already consistently holds that global markets exist. For example, in *UTC/Rockwell Collins*, it defined global markets for aerospace equipment; in *Siemens/Alstom*, the Commission defined a global market in a more precise manner, in finding that the relevant geographic market for both high-speed and very high-speed trains could be global excluding China, South Korea and Japan, as there were insurmountable entry barriers for foreign suppliers in those three countries (para 133). As for antitrust, the Commission has defined the market as worldwide with the exception of China in *Google Android* (paras 400-441).

The Draft Notice also clarifies the Commission’s position regarding imports. It explains that “*the mere existence or possibility of imports in a given geographic area does not necessarily lead to widening the scope of the geographic market to the area where imports originate*”. The key criteria is whether the conditions of competition are sufficiently homogeneous.

### **Market Definition in specific circumstances**

The Draft Notice discusses the market definition aspects that are specific to certain industries, sectors or types of markets.[1]

### **Market definition in the presence of significant investments in R&D**

Regarding highly innovative industries, where there is sufficient visibility on the R&D process of pipeline products to establish the market to which they will likely belong, the Commission may find that such pipeline products belong to an existing relevant product and geographic market. Where an R&D process may not be closely related to any specific product but related to earlier stages of research, product market definition may still be relevant to identify the boundaries within which enterprises compete in such earlier innovation efforts. In *Bayer/Monsanto*<sup>[2]</sup> and *Dow/DuPont* <sup>[3]</sup> for instance, the Commission has employed the concept of innovation spaces to analyse innovation competition.

The Commission emphasises that innovation is a key parameter of competition and that it may “*factor in all potential outcomes of R&D processes and assess in particular those scenarios where competition would be significantly affected by the conduct or the transaction in question*”.

### **Market definition in the presence of multi-sided platforms**

The development of digital markets has challenged existing tools on market definition even outside the EU. The US Supreme Court dived right into the issue with its landmark *Ohio v. American Express* judgment finding that “*the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes*”.

The Draft Notice offers new guidance in this regard – the Commission may define a relevant product market for the products offered by a platform as a whole or separate relevant product market for the products offered on each side of the platform.

The non-price elements are relevant for the assessment of substitution. These include product functionalities, intended use, evidence on hypothetical substitution and on competitive constraints based on industry views, and barriers or costs of switching such as interoperability with other products and licensing features. The Commission may also consider an alternative to the SSNIP test—the “SSNDQ” test, which is assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality.

### **Market definition in the presence of after markets, bundles and digital ecosystems**

Echoing the request for more clarification on after markets, the Draft Notice explains that there are generally three possible ways to define markets: (i) as a system market comprising both the primary and the secondary product; (ii) as multiple markets, namely, a market for the primary product and separate markets for the secondary products associated with each brand of the primary product; and (iii) as dual markets, namely, the market for the primary product on the one hand and the market for the secondary product on the other hand.

It explains the circumstances in which each market definition may be appropriate and it provides guidance on the application of these principles in bundles and digital ecosystems. In particular, as regards digital ecosystems, the Commission explains that when the secondary (digital) products are offered as a bundle, it may assess the possibility of that bundle constituting a relevant market on its own. It acknowledges that not all digital ecosystems fit an after-market or bundle market approach. In any event, it may take into account elements such as network effects, switching costs and single

or multi-homing decisions for the purpose of market definition.

### **Evaluation of evidence**

The Commission agrees with the view of some stakeholders that it shall not apply a rigid hierarchy of different sources of information or types of evidence. While this allows the Commission to treat evidence from different sources with flexibility, it shall be highlighted that this could also amplify legal uncertainties that enterprises are already facing, especially in complex merger cases, in which the authority is presented with often conflicting evidence of various types.

It emphasises that evidence used to define markets should be reliable. This is likely to be the case when the evidence comes from public authorities or is supported by multiple sources, including by market participants with conflicting interests. In the case of forward-looking assessments and when market definition is based on changes in competitive dynamics within the time period considered, *“such changes must be supported by reliable evidence showing with a sufficient level of certainty that the expected changes will indeed materialise”*.

A higher probative value is attributed to evidence that cannot have been influenced by the Commission’s investigation, such as evidence pre-dating discussions of a concentration or conduct and pre-dating the Commission’s investigation. For instance, internal documents of relevant entities that are prepared in the ordinary course of business are more relevant than those prepared in view of or during the Commission’s investigation. In practice, however, it is regrettable that the Commission often analyses internal documents in a superficial manner, without hearing witnesses who may explain the content and purpose of such documents.

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[1] The Draft Notice also addresses market definition in the presence of significant differentiation and price discrimination.

[2] M.8084 Bayer/Monsanto, paragraphs 1005-1024 and 1543-1554.

[3] M.7932 Dow/DuPont, paragraphs 342-352.

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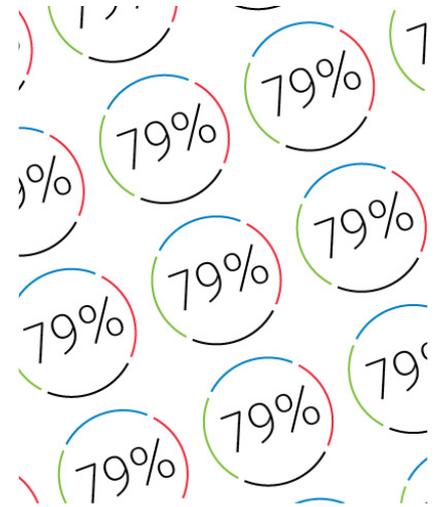
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